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LAW OF ASSOCIATION—UNIVERSITY OF PENNSYLVANIA EXAMINATION—QUESTIONS AND ANSWERS, May 29, 1902.—[The REGISTER publishes herewith the questions in the examination in the subject of the Law of Association together with the answers thereto given by Mr. Horace Stern, of the Class of 1902. It is believed that they will prove of value to students of the Law Department as showing how one other student, at least, treats the hypothetical cases proposed, and to others as showing the kind of work done in the Department as well as giving a view of the law on some important questions in this subject. In order to add to the general value of the publication the citations of the cases mentioned by name have been added, otherwise the answers are as prepared in examination.—ED.]

1. *Question.*—B., C. and twenty others each subscribed $1,000 to a fund to be expended in purchasing land and erecting a building for the use of a political club of which they were all the members. In order to provide as far as possible for the

expense of maintenance, the associates proposed to rent out the building from time to time when not in use by them. Title was taken in the name of B. and C. as trustees, who were also elected at a meeting of the associates to act as "managing partners." The venture proved profitable and annual balances were distributed among the members. B. died intestate, leaving A. his widow. The building was sold and a fund produced for division. A. claimed dower in B.'s share as against X. who claimed the share as personal representative. Which claim is valid?

Answer.—It is clear that, unless the associates of the club in this case can be said to have formed what the law calls a partnership, the share of any of the associates would, upon his death intestate, pass to his widow (to the extent of a dower interest) and heirs. If a person is merely one of the co-owners of land, whether his interest be that of a joint tenant or tenant in common, his interest is still, for all purposes, an interest of "realty." He can demand partition upon proper cause shown, judgments against him are a lien on his land, and his interest descends upon his death as realty. If, however, the land is embarked in a partnership, the law regards it as personalty. The partner cannot demand the land as such; he can merely claim the right that the partnership assets be sold, and that there be an accounting to him of his share, after payment of firm debts, upon dissolution. If partnership land were not regarded as personalty, judgments against the partners for individual debts would be a lien on the land held in partnership, and this would interfere greatly with trade.

Whether the court would consider the land as personalty where one of the partners dies, and the land is sold, and the question is merely as to distribution among those entitled as heir or personal representative, is a mooted question. The English rule is that the fund should be regarded as realty even for this purpose. The Massachusetts rule is *contra.* (*Shearer* v. *Shearer,* 98 Mass. 107, 1867). The Pennsylvania rule (*Foster's Appeal,* 74 Pa. 391, 1873), rests on a theory of "reconversion" of the "personalty" into land upon dissolution of the partnership, so that the heir takes as against the personal representative.

But in the present case these doctrines need not be discussed, because, I think, there was no partnership formed; the associates were simply common law co-partners of the land; there never was a "conversion" of the land into personalty; and therefore, as stated above, there is no reason why each associate's interest should not go to the widow and heirs, as a fund derived from realty owned by the intestate at his death. A partnership connotes a trading enterprise for purposes of gain; there must be purchases and sales of land or goods with a view to profit. Merely purchasing land or chattels in common, and then jointly using that land or those chattels in the way they are to be usually

enjoyed, does not constitute the co-purchasers and co-owners partners. If the associates in the present case had been real estate dealers, buying lands and selling them again, or leasing them out with a view to business profit, they might be partners, because, at the present day, land may be the subject of trade as well as chattels. But merely purchasing in common a single parcel of land, for purposes of a club, and incidentally leasing it out in order to supplement the other revenues of the club, is not such an embarking in trade as the law regards as a partnership, and the mere fact that surplus revenues were obtained each year makes no difference. Nor is it here material that the associates spoke of some of their number as "managing partners." People who as a matter of fact do not embark together in trade, cannot constitute themselves partners simply by calling themselves such.

For these reasons I think that the relation between the associates was here not that of partners, but merely of co-owners of land with the title vested in two of their number. Therefore, A., the widow, should, in all jurisdictions be entitled to dower in this fund, as to her husband's share therein.

2. *Question.*—B., C. and others attempt in good faith to organize a manufacturing corporation under a general law. Through an oversight their articles of association are not filed. Business is begun, and in ordinary course the associates, acting in the common name, contract a debt to A. The common treasury having been exhausted A. brings assumpsit for the debt against B., C. and the other associates. Pending the suit judgment of ouster is pronounced in a quo warranto proceeding instituted against the associates by the Attorney General. At the trial of A.'s action, A. offers said judgment in evidence. The trial judge excludes it and directs a verdict for B., et al. Is he right?

Answer.—I think that the ruling of the trial judge is correct. The first question in the case is whether there was here a *de facto* corporation. If there exists a law under which associates can be incorporated, and a *bona fide* attempt is made to organize as a corporation under that law, but for some reason, the steps taken are insufficient to form a *de jure* corporation, and there is an open user of corporate privileges, business being conducted as by a corporation, the law regards the association thus formed as a corporation in fact. It is true that the state may challenge it, and oust its assumption of franchises by quo warranto proceedings. But as to all the rest of the world it is a regular corporation, and its charter and legitimacy cannot be collaterally attacked. At one time Pennsylvania held that if the attempt to organize as a corporation was made under a *general* law (as opposed to a special granting of a charter) no *de facto* corporation resulted, because the license or certificate of incorporation was then given by the state official merely as a formal or ministerial act. But this ruling (*Paterson* v. *Arnold,* 45 Pa. 410, 1863),

was reversed (*Cochran* v. *Arnold,* 58 Pa. 399, 1868), so that, in the present case, *there was a de facto* corporation.

But to determine the next question involved in the case, we must consider on what theory *de facto* corporations rest. If the doctrine is based merely on public policy,—that it would be impolitic to subject corporation charters to collateral attack,—then the reason for the general rule would, in the present case, be gone, because the plaintiff (A.) need not himself usurp the state's prerogative by attacking the charter; all he need do is to show that the state has already vacated the charter. If, on the other hand, the doctrine of *de facto* corporations rests on estoppel, viz, that the plaintiff, by having dealt with the corporation as such, is estopped from denying that it is one, and from afterwards seeking to hold the associates liable as general partners, then A. in the present case would not be helped by the subsequent vacating of the charter; he, at least, is estopped from denying that he contracted with the association as a corporation and relied merely on its corporate treasury for payment.

My own thought is, that the theory should not rest on estoppel, and that the ruling in such a case as *Society Perun* v. *Cleveland,* 43 Ohio St. 481, 1885, is correct. None of the elements of estoppel are present; the plaintiff is the person, if any, who is misled; he has not deceived anyone or made any representations which he should be estopped to deny. The doctrine should rest on the ground that for purposes of safe trading, "corporations" doing business as such should be regarded conclusively as such *inter partes,* and only the state, the creator of corporations, should have the right to object.

But, even proceeding on this theory, there arises the final question—admitting that the doctrine of *de facto* corporations is based only on considerations of public policy,—does not public policy require also that a quo warranto proceeding should not be retroactive in its effect? That even if the corporation be dissolved by the state, all contracts which had been made by the corporation as such should be regarded in law as corporate contracts, and that one dealing with the corporation should not be allowed to take advantage of subsequent proceedings by the state, to give him greater rights in regard to his contract than he had when he entered into it? I think that public policy should require that step to be taken, irrespective of any question of estoppel on the part of the plaintiff. If so, then A. should not be allowed here to give the judgment of ouster in evidence in his own civil action.

Therefore, the general rule of limited liability should apply. A.'s remedy should be only against the corporate treasury, and B. et al., the defendants, should receive the verdict in this action.

3. *Question.*—A., a creditor of the B. Manufacturing Company, filed a bill in equity against the corporation, alleging its

insolvency and praying that a receiver be appointed to wind up its affairs. This was done and the receiver filed an account showing a balance for distribution among the creditors. A., before the master, claimed a right to receive payment in priority to certain directors of B. who held B.'s notes for money borrowed. A. also offered to prove that B. had been fraudulently organized by the directors, that the 10 per cent required by statute had never been paid in and that there were false statements in the certificate as filed. How shall the master decide the question presented?

Answer.—The rule of partnership is, that a partner cannot, in competition with firm creditors, set up a claim of his own against the firm, and obtain thereon a *pro rata* dividend out of firm assets. This is because a partner's liability is unlimited, and whatever he might individually obtain from the firm assets would be liable to attachment by firm creditors who had not received full satisfaction for their claims out of firm assets. But different considerations apply to the case of stockholders in a corporation. They are liable only to a limited extent, viz, in the absence of statute, to the amount of their stock. If, therefore, they have fully paid up their stock, and are therefore no further liable to the corporation or its creditors, there would seem to be no reason why, for any *bona fide* claims which they may have as individuals against the corporation, they should not be allowed to come in *pari passu* with corporate creditors. This is the doctrine of *Sawyer* v. *Hoag,* 17 Wall. 610, 1873. Any remaining liability for unpaid stock subscriptions, a stockholder cannot pay by a claim of his own against the company. He must first pay up to the amount of his stock; then and then only can he bring in his individual claim for a pro rated share with other creditors.

Therefore, unless the directors here have paid up their stock, they cannot pro rate with the corporate creditors as to firm assets, in order to recover their own claims. A., the creditor, alleges that the stock has not been full-paid. A creditor generally can proceed in equity against the stockholders of an insolvent corporation, to compel them to pay up stock subscriptions in full. If the stock purported to be "full-paid," nevertheless, is not so paid in fact, the subscribers must pay up in full, for the benefit of any creditor whose claim was subsequent to the issue of such stock, *and upon which issue he may therefore be taken to have relied.* If, however, as in the present case, the legality of the charter depended on the filing of this certificate that the stock was fully paid, can a creditor go behind the statements of the certificate and show that the stock was not paid up? He can, because he is not seeking (as in the previous question) to set aside the charter and deny any incorporation, but is showing a fraudulent statement as to the extent of capital of the com-

pany. Even in the doctrine of *de facto* corporations, the better opinion is, that there must be a *bona fide* attempt to organize, and that a *fraudulent* organization may be shown in order to attack the charter collaterally. A. can therefore show, in the present case (even though it may be that the charter was issued on the faith of the certificate filed) that, by fraudulent arrangement, the certificate as filed was false, and that there still is something due on the stock, and that he, in contracting with the corporation, relied on the truth of the representation made by it that the capital stock was all paid in.

I think that the master should admit the evidence offered, and that, if substantiated, he should first require the directors and other stockholders to pay in to the full amount of their stock—or, rather, to the extent of 10 per cent, as required by the statute. (By "full amount" in this discussion, I mean only the 10 per cent required by the statute, as to which 10 per cent the creditor relied. As to *him,* the stockholders do not have to pay in the full 100 per cent because he did not rely on the stock being "full" paid in its literal sense.) Then, when they have done this, and have paid in this 10 per cent, the creditor, A., and the directors are, as to their respective claims against the corporation on an equality, and may share *pari passu* out of the funds then in the corporate treasury.

4. *Question.*—B., C. and D. are partners. A. is a firm creditor. The firm is solvent. D. sells his interest in the firm to B. and C., who form a new partnership, re-embark all the old firm property in the business and become insolvent. X. becomes a creditor of the new firm of B. and C. and obtains judgment against them. A. files a bill against X. seeking to enjoin him from selling the firm property until provision is made for the payment of A.'s debt. X. defends on the ground that A. must first endeavor to collect his debt from D. Is there merit in either the claim or the defence?

Answer.—The principal question here is whether, when D. sold his interest in the firm of B., C. and D. to B. and C., the equities of the three partners *inter se* that the firm property should be used to pay firm debts was given up, so that the firm creditors could no longer assert it. If we regard the transaction as one similar to that in *Baker's Appeal,* 21 Pa. 76, 1853, viz, that a firm of three sold out its property to a firm of two, then the equities *inter se* of the partners as to the first firm are gone; what is sold is the actual firm chattels, which become, as to the firm, the separate estate of a new partnership, and as to which the firm creditors can no longer assert a "lien" through the medium of the partners' equities. In that case, A. here would have no prior rights whatever as against this property. But if (and that, as I read the facts, is the way in which the transaction must be construed), D. merely sells out *his* interest

to B. and C. as individuals, then it seems to me that the partners' equities are retained. D. sells merely his right to a surplus after partnership debts are paid; he takes no covenant of personal indemnity that the vendees will pay the debts of the firm, but relies on the debts being paid out of the firm assets. It is true that in Pennsylvania the partner's equity is regarded as a mere property right, which cannot be retained when the property is sold. But even in Pennsylvania, the remaining partners are sufficient to retain the equity until the partners' interests become finally all sold out, as in *Doner* v. *Stauffer,* 1 P. & W. 198, 1829. Till then, the firm creditors can, working through the partner's equities, assert their derivative right to insist that the firm assets be applied first to the payment of their claims and that no subsequent use of them (in the absence of a release by the remaining partners of their retained equity) can deprive them of this "vested" right.

If, therefore, the partners' equities were here retained when D. sold his interest to B. and C., the firm creditors have the right to assert priority as to execution on the firm assets, provided always that the remaining partners do not release their equity. Therefore, in this view of the case, A.'s claim is valid, that he, as a creditor of B., C. and D., can claim payment out of these assets, in priority to any individual creditor of B., C. or D., or to any creditor of any two of them in a new partnership relation, and who, as far as creditors of the first firm are concerned, is an individual creditor.

X.'s defence that A. must first endeavor to collect his debt from D. is invalid. A firm creditor can, at his option, proceed against the firm estate, or the separate estate of either of the partners. But there is no legal obligation on him to proceed first against the individual estates. It is true that equity will sometimes compel a creditor who has a lien on two funds, first to exhaust (at the instance of a creditor who has a lien only on one), the fund on which the second creditor has no claim. But in the present case there is an attempt to compel A. to give up a right on the property of B. and C., and compel him to proceed first against the separate estate of D. (not against the separate estate of B. or C.). *Meach* v. *Allen,* 17 N. Y. 300, 1858, intimates that this doctrine of equity will not be carried to such an extent.

5. *Question.*—Assumpsit in the Circuit Court of the United States by A., receiver of the X. National Bank, against B., a stockholder at the date of the filing of the petition for appointment of the receiver. A.'s claim is for the amount of B.'s "additional liability" under the National Banking Act as determined by an assessment made by the Comptroller of the Currency. B. defends on the ground that he was induced to become a stockholder by fraudulent misrepresentations of the officers of X. Has the fact that such misrepresentations were made any legal

effect? If so, can B. avail himself of the fact in this proceeding?

Answer.—It is a general rule of equity, that, when A. is induced to enter into a contract with B. by fraudulent misrepresentations of B., he can, provided the rights of no innocent third parties have intervened, have the contract set aside, and the parties restored, as far as possible, to their *statu quo ante.* Therefore, if B. is induced to become a stockholder of a corporation by the fraudulent misrepresentations of its agent officers, there is no reason why, *as between the company and B. merely,* he should not, in the absence of unreasonable laches, have the contract by which he became a stockholder, avoided. But different considerations apply where third parties have entered into relations with the company, relying on the validity of the contract of subscription between B. and the company. The contract is then properly no longer voidable, because the equities of third parties have intervened, and the question then for the court to decide is as to the relative merits of these two conflicting equities.

A case somewhat analogous is *Steacy* v. *R. R. Co.,* 5 Dillon, 348, 1879. There a person who in good faith bought stock marked "full-paid" was held not liable to the creditors (although the stock was not in fact full-paid) who had dealt with the company in reliance of the stock being full-paid.

In the present case, in so far as the receiver represents the Bank itself, B.'s defence apparently would be good. He could have his subscription set aside, and in that case no additional liability could attach to him. But if, before the contract is set aside, creditors have dealt with the Bank, relying on the fact that B. was a stockholder, and knowing that stockholders were subject to additional liability, then, since the receiver represents also the creditors, is B.'s defence longer valid? I think that it should *not* be valid. In *Steacy* v. *R. R.* the creditors had merely an equitable right, on the theory that the capital of a corporation is a trust fund for the payment of creditors. But in the present case the creditors have a statutory clear right to enforce additional liability against all who in fact are stockholders at the time the receiver is appointed. B. is in fact a stockholder. His contract was not void, but voidable, and has in fact not been avoided until after the liability attaches to him by the assessment made by the comptroller and demand upon him. I think that until his liability thus became fixed, he would, as against the company, have had the right to withdraw. But it is too late to set up this equitable defence when the creditors' rights have legally attached, and become fixed by the petition for a receiver. Therefore B.'s defence in this proceeding should not be held a valid one.

6. *Question.*—B. is a stockholder in the X. Manufacturing

Company. The charter of the corporation imposes upon stockholders an additional liability "to creditors" equal to the amount of their stock. B. also holds bonds of X. to a par value exceeding his additional liability. X. fails and A., a creditor of X., sues B. who seeks to set off his claim upon the bonds. Shall the set-off be permitted?

Answer.—There is some conflict as to whether a separate creditor can, by suit, enforce against a separate stockholder, a liability imposed by such a statute as that here set out. (*Patterson* v. *Lynde, Flash* v. *Conn.,* 109 U. S. 371, 1883, etc.) It depends on the wording of the statute. I assume that, under the statute in this case, A.'s suit against B. was a proper one.

It seems to me that when a statute imposes additional liability on stockholders, that liability is in all respects the same in quality and nature as their original liability. It is primary, and not the liability merely of a surety. That being so, I think that (for reasons discussed in the third question, *supra*) B. should not be allowed to set off, as against A., his (B.'s) claim against the company. This conclusion would seem to follow from the fact that B. is one of the stockholders in the company. As such he is subject to a liability to A. to a certain extent. Until that liability is fully satisfied, he should not be allowed to compete with his own creditor. Once the liability is satisfied, then he can pro rate with his creditor as to corporate assets, for his own claim against the company. *Sawyer* v. *Hoag,* 17 Wall. 610, 1873, is authority for the proposition that a stockholder cannot set off, when there is a demand on him for unpaid stock subscriptions, a claim which he has against the company. The same principle, it seems to me, applies where there is an additional statutory liability, as to which the stockholder is just as much liable to creditors as in the case of his original stock liability. The fact that the action in the present case is brought, not for the benefit of all creditors, but by an individual creditor, does not vary the principle. The liability imposed by the statute is not to be regarded as a distinct liability of an individual as such, but as the liability of a stockholder,—of an associate,—and, in that view, the debtor associate should not be allowed, until he has settled this liability, to set off debts which the body, of which he is an associate, owes to him. If the set-off were allowed in this case, it would be practically making A., a creditor of the corporation, pay B., a stockholder, a debt which the corporation owes to B. The mere statement of the proposition seems to me to show its inherent absurdity.

7. *Question.*—The City of X. in the State of Y. issues bonds, some of which A. buys in good faith. The legislature of Y. then dissolves X. and declares its corporate existence terminated. The same act declares that the occupants of the territory of X. shall be a corporation under the name of the City of B. and conveys to B. the public buildings and city parks lately

belonging to X. A. brings an action at law against B. on the bonds. Is he entitled to judgment? If so, what is the proper method of enforcing it?

Answer.—When A. bought bonds from the City of X., the legal remedies which A. then had against the city to enforce payment of the bonds entered into the contract and became a part of it, in the sense that the legislature of the state could not subsequently (under the United States Constitution) impair these remedies as against A. If, therefore, a legislature dissolves X. in such a case, and makes all its inhabitants members of a new corporation, and does not impose liability upon the new corporation to pay the debts of the old corporation, it is practically taking away all remedies of A. to collect his claim on X.'s bonds, and is therefore enacting, as to him, unconstitutional legislation. The courts however assume that, if the legislature does not specifically provide for some assumption of the old city's liability, it must have been its intention that the new corporation is liable for the debts of the old one. This assumption of intention on the part of the legislature is in order to avoid the other alternative, that the act is unconstitutional.

A. is therefore considered to have the right to hold B. liable on his bonds, just as if the legislature had expressly so provided, or as if he had made a novation of his contract, accepting B.'s liability in place of X.'s. It seems to me that on this theory, he would have legal and not merely equitable rights against B., and should be allowed to obtain judgment in an action at law on the bonds against B. In executing his judgment, or an equitable decree in his favor, he cannot, in any jurisdiction, take public parks, buildings, etc., in execution. This is on the ground of public policy. In New England, he would be allowed to take the private property of the individual citizens in execution, if he could not satisfy his judgment out of funds in the city treasury. But this doctrine is peculiar to New England. His only remedy in other jurisdictions is, if his execution against the city's treasury funds is returned unsatisfied, to obtain a mandamus on the proper city officials to levy a tax sufficient to pay his judgment. If for any reason the execution of this mandamus becomes ineffectual, the courts can do nothing more; they cannot appoint officials of their own to levy and collect the tax.

8. *Question.*—Section 5,151 Revised Statutes of the United States imposes on the shareholders of national banks a liability for the debts of the bank equal and in addition to the amount invested by them in the stock. Section 5,139 makes the shares in such bank stock transferable on the books of the corporation and invests transferees with the rights and liabilities of the prior holder. The B. National Bank lends money to X. upon the deposit by X. as collateral of a certificate for 180 shares of stock in the Y. National Bank standing in X.'s name. Upon default

by X., B. buys in the stock at public sale for a nominal sum but never votes the stock or receives dividends and no transfer takes place on the books of Y. Y. fails and A., receiver of Y., sues B. to enforce the additional liability, on the theory that Section 5,151 imposes such liability upon the real owner, irrespective of actual transfer. Can A. recover?

Answer.—I think that A. should be entitled to recover. There are two theories as to the necessity of having a transfer of stock recorded on the books of the company. One is, that until such transfer is recorded, the legal title does not pass, the transferee of the stock with blank assignment and irrevocable power of attorney gets merely an equitable title. (*White* v. *Salisbury,* 33 Mo. 150, 1862.) The other theory is, that the legal title passes, as between the parties, and that the recording on the company's books is merely like the necessity of recording deeds; it is to protect subsequent purchasers in good faith from the assignor, and also for the convenience of the company itself in "keeping track of" its stockholders. If the latter be the theory we adopt in the present case, there would be no question of B.'s liability. B. would have both the legal and the beneficial ownership, and in that capacity of both "real" and "legal" owner, would succeed to all rights and liabilities attached to the ownership of the stock. It makes no difference how much or how little B. paid for the stock, nor whether he in fact voted it or received dividends on it. He had the *right* to vote it and receive dividends on it whenever he chose to record it and make demand on the company, and he cannot escape liability on the ground that he made no attempt to enjoy the fruits of his property.

But if we adopt the view of *White* v. *Salisbury,* that a transfer of the stock certificate, with assignment in blank and irrevocable power of attorney, passes merely all the "dominion" which the assignor had in the stock,—all equitable ownership,—but that the legal title vests in the assignee only upon the recording of the transfer on the books of the company, then we must answer the question whether this act of Congress was intended to impose liability on the "real" owner, or on the person in whose name the stock remains recorded, and who is therefore technically the legal owner. It seems to me, in the absence of any express words in the act to determine the question either way, that the "real" owner should be the one liable. He has all beneficial rights in the stock as soon as he chooses to have the stock recorded. It is true that until he does so, the assignor is entitled to receive dividends from the company, in the sense that the latter would be justified in paying them to him as long as he is the owner on their books. But the power of having the transfer made on the books rests with the assignee, not with the assignor, and, as I said before, he should not, by neglecting to enjoy the fruits of his stock, throw liability on the person who assigned to him and who

is probably resting on the assumption that the transfer has been made. Again, any other construction of this act would enable stockholders to escape liability by having the stock transferred on the books into the name of "straw" men, while they, under a deed of trust, were enjoying the beneficial ownership.

I think that the act should, therefore, be construed in accordance with A.'s contention.

9. *Question.*—Comment (favorably or unfavorably, but at a length not exceeding fifteen lines) upon the following definition of a corporation: "*'Corporation'* is the name given to a group of persons owning joint rights and associated upon such terms that action affecting the joint interests of all can be taken only by official representatives."

Answer.—This definition appears to me to point out that which distinguishes corporations from other forms of association. Co-tenancy, joint tenancy, partnerships, joint stock companies, etc., are all associations where the associates enjoy joint rights, but in none of them is the representative principle developed to such an extent that action by representation entirely displaces group action and makes it of no legal effect. But in a corporation this is distinctively true. Corporate action can be taken only by official representatives, for if all the members of the group were, as individuals, to sign a deed, it would not pass title to corporate property.

10. *Question.*—The X. Railway Company and the Y. Railway Company, corporations of Pennsylvania, own parallel and competing lines of railway engaged in interstate commerce. The Constitution of Pennsylvania forbids railroads and their lessees, purchasers or managers from consolidating, leasing, purchasing, or in any way controlling any parallel or competing line. The B. Company is formed under the law of New Jersey with authority to acquire and hold the stock of railroad companies. The incorporators of B. are M. and H. who own, respectively, the majority stock of X. and Y. M. and H. then transfer to B. enough of their stock to give B. a little less than the majority of the stock of X. and Y., receiving in exchange a corresponding number of the shares of B. M. and H. transfer the residue of their X. and Y. stock to T., a trustee, who covenants to vote it in harmony with the stock held by B. The Attorney-General of the United States files a bill against B., H., M., X., Y. and T., reciting the provision of the State Constitution and the prohibition of the Sherman Act against contracts and combinations in restraint of trade, and prays for an injunction to restrain the voting of X. and Y. stock by B. and T., and compel a restoration of said stock by B. to H. and M. Indicate (but do not discuss) the legal questions raised by a demurrer to the bill.

Answer.—The following questions seem to be arguable on a demurrer to this bill:

(1) What is the standing of the plaintiff in court? Can he, as Attorney-General of the United States, enforce the Constitution of Pennsylvania, or is he restricted to showing that the acts complained of are in violation of the Sherman Act?

(2) If he has only standing to show the latter, have the defendants in fact violated the Sherman Act? The determination of this question depends on answers to the following questions: When M. and H. transferred part of their stock in X. and Y. to B., had there as yet been any contract or combination in restraint of trade among the states? Would they not have been justified in selling this stock to an individual? Could B., as a mere *minority* stockholder in both X. and Y., be said to control those roads, or to have "combined" them?

Then, when M. and H. transferred the residue of their stock to a trustee merely for the purpose of voting it, is this legal at common law? Even granting that the parties themselves could repudiate the "trust," can an officer of the state overthrow the transaction as against public policy? And then, if a state attorney-general could do this under the common law, does it violate the *Sherman Act* simply to establish a voting trust, in the absence of other facts?

If neither of the transactions (the sale of part of the stock to B., and the vesting of part in the trustee) in themselves constitute a combination in restraint of trade, do the two transactions taken together effect such a result? If no one person or corporation owns a majority stock in *either* corporation X. or Y., in what consists the combination? Can it be illegal simply for part owners of the stock in each to have an understanding or a covenant, that they will vote their stock in the interests of both corporations? Is not the net result of the transaction simply that if two stockholders in corporation X. vote in harmony they can control the action of that corporation; and that if two stockholders in corporation Y. vote in harmony they can control the action of that corporation, and that these are the same two stockholders (viz, B. and T.) in both cases, and therefore that they have sufficient voting strength to run the two corporations in harmony with one another? Is there anything to show that even if B. and T. vote their stock together in each corporation, they have any arrangement or purpose to so vote it as to run X. and Y. for some common purpose, rather than in the interests of the particular corporation in which they happen to be voting the stock?

Finally, admitting that the transaction complained of would violate the Sherman Act, can the Attorney-General have the relief he prays? Does not the Sherman Act merely prescribe a criminal penalty for its violation? Does it allow the combination itself to be set aside? If not, how can the plaintiff here enjoin the voting of the X. and Y. stock by B. and T., or compel a restoration of the stock by B. to H. and M.?